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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-153

WASTE MANAGEMENT OF
WISCONSIN, INC., d/b/a
CITY DISPOSAL COMPANY,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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JURISDICTION

The jurisdiction of this Court to review a judgment of the highest court of a state is sought to be invoked by the petitioner under the grant of jurisdiction found in 28 U.S.C. §1257(3). This Court, however, lacks such

jurisdiction for the reasons specified in the Argument section, *infra*.

QUESTIONS PRESENTED

The 85 page petition lists ten federal questions which are allegedly presented. These questions all relate to the alleged effect of the decision of the Wisconsin Supreme Court and none of them are questions which were presented to or decided by the Wisconsin Supreme Court (Pet. Ap. 1-21).

STATEMENT OF THE CASE

On February 23, 1973, a Dane County, Wisconsin, grand jury indicted the petitioner, a corporation, and its local general manager, as well as a former local general manager, for conspiring to restrain competition in the garbage hauling industry in Dane County, Wisconsin, in violation of sec. 133.01(1), Wis. Stats. The indictment charged the petitioner and its local general managers with conspiring to allocate customers and to submit rigged bids for garbage hauling services. Also named as unindicted conspirators were Tony Pellitteri Trucking Service, Inc., and Jerry Beecher, doing business as Doug's Sanitation Service, Inc. The alleged conspiracy included the submission of rigged sealed bids to the University of Wisconsin, the Forest Products Laboratory, the Veterans Administration and the United States Army Reserve.

On July 31, 1975, following a nine-day trial, and after two earlier mistrials, a jury found the petitioner guilty, but acquitted its local general manager. The former local general manager is fighting extradition and has not been tried. The trial court adjudged the petitioner guilty, imposed a $4,000 fine on it and denied all of its motions for post-conviction relief.

The petitioner appealed to the Wisconsin Supreme Court. On appeal, the petitioner's brief listed 16 questions, only one of which referred to the United States Constitution or any federal statute or treaty. That question was, "Did the creation or use of tapes violate the 4th Amendment, the Wisconsin Constitution and law?" The Wisconsin Supreme Court decided the numerous questions raised on appeal primarily and almost exclusively /1 as issues of state law. It affirmed the judgment of conviction and the order denying post-conviction motions. A motion for rehearing was made by the petitioner and denied by the court without opinion (Ap. 23).

This petition was thereafter filed.

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court.

A. The ten federal questions allegedly presented by the petition were not presented to and decided by the Wisconsin Supreme Court and the 29 claims of error which were presented to and decided by it were primarily decided as issues of state law.

The opinion of the Wisconsin Supreme Court here involved is found in 81 Wis. 2d 555 and 261 N.W. 2d 147 and

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/1 On the above quoted question the Wisconsin Supreme Court cited *United States v. White*, 401 U.S. 745 (1971), and held that the tapes involved, which were one-party consent tapes, "are not 'searches' within the compass of the Fourth Amendment." 81 Wis. 2d at 570 and Ap. 8-9.

is printed on pages 1 through 21 of the appendix to this petition. A comparison of that opinion with the ten federal questions set forth in the "Questions Presented" section of the petition reveals that none of those questions were presented to or decided by the Wisconsin Supreme Court. Although the petitioner's brief to the Wisconsin Supreme Court listed 16 questions, that 85 page brief was such that the Court identified 29 issues, which fell into five major categories. All of these issues were primarily decided as issues of state law (Ap. 2-21).

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257(3). That jurisdiction exists only when the federal question or questions sought to be reviewed have been properly presented to and decided by the highest court of the state and its decision of the federal question or questions was necessary to its determination of the cause. This principle was set forth as follows in *Durley v. Mayo*, 351 U.S. 277, 281 (1956):

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52.' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction because the federal question raised had not been presented to and decided by the state court is *Cardinale v. Louisiana*, 394 U.S. 437 (1969). This Court therein wrote at p. 438:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with *no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v Duel, 324 US 154, 160-163, 89 L Ed

812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)[2]

This Court has no jurisdiction to consider any of the ten federal questions allegedly presented by this petition because those questions were not presented to and decided by the Wisconsin Supreme Court.

Further, even if the numerous questions which were presented to and decided by the Wisconsin Supreme Court were erroneously decided, which they were not, this Court still has no jurisdiction to review them because the Wisconsin Supreme Court decided them primarily as issues of state law. As stated in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930):

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that *this court's power to review decisions of state courts is limited to their decisions on federal questions;* and that *the mere fact that a state court has rendered an erroneous decision on a question of state law,* or has

[2] *See also* such cases as *Hill v. California*, 401 U.S. 797 (1971); *Monks v. New Jersey*, 398 U.S. 71 (1970); *DeBacker v. Brainard*, 396 U.S. 28 (1969); *Street v. New York*, 394 U.S. 576 (1969).

> overruled principles or doctrines established by previous decisions on which a party relied, *does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*" (Emphasis added.)[3]

This Court, therefore, has no jurisdiction to review either the federal questions now raised, but which were not presented to or decided by the Wisconsin Supreme Court, or the numerous questions of state law, which were presented to and decided by the Wisconsin Supreme Court.

[3] *See also, Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *United Gas Public Service Co. v. Texas*, 303 U.S. 123 (1938); and *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454 (1907).

CONCLUSION

For the above reasons this Court has no jurisdiction to review the judgment of the Wisconsin Supreme Court and the petition for a writ of certiorari must be denied.

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